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Israel, The Arabs, and International Law:

Whose Palestine Is It, Anyway?

Ilan Dunsky*

In recent years no conflict has engendered as much disagreement as the Arab–Israeli conflict. Both sides have used every means available to them – from the use of force to international law – to bolster their respective claims. In spite of its frequent use as a political tool, international law can, and does, provide a framework for a resolution to the Palestine question. Any analysis includes a consideration of international legal principles, including the Palestine Mandate, and their historical application to the parties. Specifically, the 1967 United Nations Resolution 242 demands the return of territories captured by Israel in 1967 in exchange for secure boundaries peacefully accepted by all parties. At present, international law recognizes that Israel is the legal possessor of the disputed territories; its proper application, however, would suggest that Israel holds these territories in stewardship for the people of the territories, in anticipation of a final settlement.

Aucun conflit n'a engendré autant de discordance depuis quelques années que le conflit israëlo-arabe. Les deux côtés au conflit ont utilisé tous les moyens en leur puissance – de la force au droit international – pour soutenir leur position respective. En dépit de l'utilisation fréquente du droit international comme outil politique, il fournit une charpente pour la résolution de la question de la Palestine. L'analyse englobe les principes du droit international incluant le Mandat Palestinien, et leur application aux parties. Cette étude analyse de façon particulière la Résolution 242 passée par les Nations Unies en 1967 qui revendique que les territoires capturés en 1967 soient rendus en échange pour des frontières pacifiques acceptées par toutes les parties. Présentement, le droit international reconnaît Israël comme le possesseur légal des territoires disputés. Mais la bonne application du droit international suggère plutôt qu'Israël tienne en intendance ces territoires pour le peuple de ces territoires en anticipation d'un arrangement définitif.

Perhaps no post-war political issue has dominated the world's attention more than the Arab–Israeli dispute. Beginning its most intense phase at the dawn of the cold war, involving vastly different cultural interpretations of history and politics, and being at its core, a clash between sometimes seemingly

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irreconcilable ideologies, the struggle between Arab and Jewish nationalism apparently defies the traditional rules and assumptions of international law. While all of the parties to the conflict claim to be acting within international law, from the standpoint of the international lawyer, their often concurrent claims to have history and God on their side enormously complicate the issues.

These deep passions serve to maximize the political aspects of the conflict at the expense of legal ones, a result, in part, of the lack of clarity of applicable legal norms, such as self-defence, the acquisition of territory by force and self-determination. The problem is further compounded by the uniqueness of the situation. There are no other instances of a people returning to its homeland after an absence of nearly 2,000 years, displacing the "new" inhabitants, with the sanction of the international community and its law. This combination of strong politics and weak law together with an incomparable situation has encouraged the parties to make maximalist claims at law while hoping, at various times, to settle the dispute by political or military means.

Recently, most attempts to understand or settle aspects of the conflict have focussed primarily on territory captured by Israel in 1967. This focus is unfortunate. The claims by both sides to these territories are only subsidiary to their more fundamental claims to the whole of Mandate Palestine. Study of only one part of the claim, or of one historical period, to the exclusion of another, ignores aspects which are essential to a true understanding of the conflict. For this reason, this article treats the entire history of the conflict as one evolving problem: the question of Palestine, and not that of the West Bank or any other territories.

At the same time, I do not wish to exaggerate the question of the legality of the creation of Israel in 1948. Although this has been challenged in its entirety by the Arabs, their argument has been rejected by most serious international jurists and writers, with most of the exceptions being Arab or Muslim scholars.¹ The debate is sterile and unproductive, and it is not my intention to open it.

There are five distinct territories which will be considered: the "West Bank," or "Judea" and "Samaria"; the Gaza Strip; Jerusalem; the Golan Heights; and territory held by Israel between 1948-1967 which was not allocated to it by the terms of the 1947 United Nations Partition Plan.² Each possesses geographical, political, and legal differences which must be taken into account if one wishes to portray accurately their legal status. This article will therefore examine the territories both as parts of a greater whole, Mandate Palestine, and

¹ P. J. Gendell & P. G. Stark, "Israel: Conqueror, Liberator or Occupier within the Context of International Law" (1975) 7 Sw.U.L. Rev. 206 at 216.

² G.A. Res. 181, 2 U.N. GAOR 131-150 (1947).

individually.

It is also necessary to comment on the use of United Nations materials when dealing with the Israeli-Arab dispute, especially the General Assembly. During the 1970s that body essentially rubber-stamped any resolution condemnatory of Israel, culminating with the infamous "Zionism = Racism" Resolution of 1975.³ The General Assembly's actions have been called "a political campaign aimed at the delegitimization of the State of Israel,"⁴ which often took the form of overt anti-Semitism.⁵ The extent to which even the Security Council has compromised its impartiality with regard to the Arab-Israeli dispute is demonstrated by the fact that between 1948-1982, it "condemned," "deplored," or "censured" Israel 38 times, to the Arabs' none.⁶ Unless one believes that the Israeli-Arab dispute is essentially one between demons and angels, this figure is cause for some concern.

This is not to say that one can ignore all United Nations pronouncements on the subject, since after all, the United Nations sanctioned the creation of Israel in 1948. The United Nations is arguably the most important source of international law today, whether in sponsoring multilateral conventions, or in providing a forum for the determination of the *opinio juris* of the world community. It cannot simply be ignored because it has a bias, regardless of the effect that bias may have on the weight given to its resolutions. This article considers Security Council Resolutions as valid and mandatory. It will not consider General Assembly Resolutions of the past twenty years regarding Israel as true indications of the state of even customary law. While this is admittedly a subjective decision, the alternative - accepting all U.N. resolutions on the subject at face value - is untenable in any serious discussion of the Arab-Israeli dispute.

³ UNGA Res. 3379 (XXX). See generally, J. Stone, *Israel and Palestine: Assault on the Law of Nations*, (Baltimore: Johns Hopkins University Press, 1981); A. Roberts, "Prolonged Military Occupation: the Israeli-Occupied Territories Since 1967" (1990) 84 Am. J. Int'l. L. 44 at 74; A. Gerson, "Remarks" in "1988 Symposium of Israeli-Arab Palestine" (1989) 21 N.Y.U. J. Int'l. L. & Pol. 450 at 570. The Resolution was repealed in December 1991.

⁴ A. Gerson, "Remarks" (1985) 79 Proc. Am. Soc. Int'l. L. 217 at 224.

⁵ For example, United Nations "investigations" of Palestinian claims that Israel had poisoned Arab wells, reminiscent of medieval Europe. See Gerson, in "1988 Symposium" *supra* note 3 at 570. Regarding the anti-Semitic content of much of this, see "International Legal Conference on Anti-Semitism, anti-Zionism, and the United Nations" (1987) 17 Isr. Y.B. Hum.Rts. 9. Israel is the only country in the world to have been declared a "non-peace-loving" state, in an attempt to have it expelled from the United Nations. See Gerson, in "1985 Proceedings" *supra* note 4 at 224.

⁶ G. Tomeh, Book Review of *The Security Council and the Arab-Israeli Conflict* by Istvan S. Pogany (1986) 3 Palestine Y.B. Int'l. L. 231 at 236.

COMPETING JEWISH AND ARAB CLAIMS TO ISRAEL/PALESTINE

At its heart, the dispute over the Palestine Mandate's unallocated areas (with the exception of the Golan) is only part of a larger struggle between two nationalities, Arab and Jewish, with competing claims to the same land, known as Palestine to the former, Israel to the latter. Each believes itself entitled, for reasons of history, religion, and law, to the whole of it. It is therefore necessary to examine the claims of each group to the territory as a whole. This is particularly true as the Arab position has consistently been that the establishment of Israel in 1948 was of itself contrary to international law; that Israel is a creation of colonialism and not a legitimate State; and that the Jews have no right to "set up a Jewish State in the Arab territory of Palestine."⁷

The Jewish Claim to Israel

The Jewish claim to Israel presents a unique situation, in both the temporal distance between the Jews and their original homeland, and in the law underpinning the State. For this reason, it is more important to set out its contents than is true of the more conventional Arab claim. The Israeli claim has three principal components: history; the Balfour Declaration (as incorporated into the League of Nations Mandate for Palestine); the United Nations 1947 Partition Resolution and successful self-defence against invading Arab States in 1948–49.

History

The Jews' historical claim to Palestine is based on sixteen centuries of occupation and settlement from about the thirteenth century B.C. to the third century A.D.,⁸ and especially two periods of independence, from 1010–586, and 165–63 B.C., during which Jewish religion, culture, and literature, including the Bible, were developed. This period ended with defeat and expulsion at the hands of the Romans. It was the Romans who first renamed the land Palestine, in order to erase any connection with the Jews after two unsuccessful rebellions. Although not generally determinative of any rights at international law,⁹ the

⁷ Colloquium of Arab Jurists, July 1967, cited in N. Feinberg, *The Arab-Israeli Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers* (Jerusalem: Hebrew University, 1970) at 71.

⁸ All dates, unless noted otherwise, are from H. Kinder and W. Hilgemann, *The Penguin Atlas of World History*, (Harmondsworth: Penguin Books, 1987).

⁹ *Western Sahara Case*, Advisory Opinion, [1975] I.C.J. Rep. 12, Dillard J., cited in H. Kindred et al., *International Law: Chiefly as Interpreted and Applied in Canada*, (Toronto: Emond Montgomery, 1987) at 71.

historical connection of the Jews with Israel was legally recognized by the terms of the League of Nations Mandate for Palestine, and confirmed by the United Nations Special Committee on Palestine (UNSCOP).¹⁰

The Balfour Declaration and the Palestine Mandate

The Balfour Declaration promised British support for the establishment of a "national home" for the Jews in Palestine. It is not a legal document, and has no standing at international law. The Declaration however was specifically incorporated into the terms of the Palestine Mandate granted to Britain in 1922. The Mandate itself was established with the express aim of establishing an (undefined) Jewish National Home in Palestine, under the authority of article 22, paragraph 8 of the League Charter. The legality of the Mandate, challenged by the Arabs as a violation of both self-determination and British promises made during the First World War,¹¹ has been upheld by most writers and has been referred to several times by the International Court with no suggestion of any illegality.¹²

The United Nations Partition Plan

Following a period of growing instability and violence, the British turned the problem over to the League's successor, the United Nations, which voted to partition Palestine into a Jewish state and an Arab one, with Jerusalem as an international zone. The Jewish Agency, legal representative of the "Jewish People,"¹³ accepted the plan, but it was rejected by the Arabs, who attacked the

¹⁰ Also, Feinberg *Critical Analysis supra* note 7 at 24-26; J. Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates*, (London: Longmans, Green and Company, 1928) at 41. The point is of more than academic interest as some Arab writers have denied any connection between Jews today and the ancient Hebrews of Israel and Judea, i.e., between the Jews and Palestine. See R. Israeli, *Peace is in the Eye of the Beholder* (Berlin: Mouton Publishers, 1985). See also note 105.

¹¹ The Hussein-McMahon letters, correspondence between the Sharif Hussein and Sir H. McMahon, British High Commissioner in Cairo. The letters promised the Arabs independence but excluded the Mediterranean littoral.

¹² See Feinberg *Critical Analysis supra* note 7 at 56. The Palestine Mandate was also implicitly accepted as legal by virtue of being considered by the Permanent Court of International Justice in the *Mavromatis Palestine Concessions Case*, (1924), P.C.I.J. Ser. A, No. 2.

¹³ The "Jewish People" were recognized as an entity at international law at the Paris Peace Conference of 1919, and subsequently by the League of Nations. This status probably disappeared with the establishment of the State of Israel. See N. Feinberg "The Recognition of the Jewish People in International Law" in J. N. Moore, ed., *The Arab-Israeli Conflict*, (Princeton: University Press, 1974) at 59.

new state the day after its proclamation.¹⁴ At the end of nearly a year's fighting, Israel was left in possession of significantly more territory than had been allocated to it by the Partition Plan. Some 600,000 Palestinian Arabs had fled, mostly to Jordanian-held territory (subsequently the West Bank), Egyptian-held territory (the Gaza Strip), and Lebanon.

The Palestinian Arab Claim to Palestine

The Palestinian claim to Palestine is based primarily on the right of self-determination of peoples. Arabs have formed the majority in Palestine since their seventh-century conquest of the territory, although their rulers were generally non-Arab.¹⁵ Some, mostly Palestinian, writers claim earlier settlement, noting descent variously from the ancient Canaanites,¹⁶ Philistines,¹⁷ or other "Semites, [who are] therefore Arabs,"¹⁸ which would date them back to at least the second millennium B.C., either concurrent with or before the ancient Hebrew settlement of the area.¹⁹ They thus assert that "Palestine has never been anything but a specifically Arab land" and that it has been "Arab for at least 4,000 years."²⁰ These claims are unhistorical attempts to delegitimize the link between the Jews and Israel; in nearly all historians' opinions, they are difficult to analyze seriously.²¹ At the time of the Paris Peace Conference, however, Arabs constituted approximately 85% of the population of Palestine; in 1947, they accounted for some 65%.²² The Arabs claim that, as the majority population of a

¹⁴ Five Arab States (Egypt, Transjordan, Syria, Iraq, and Lebanon) invaded on 15 May 1948. In actual fact, however, fighting had begun several months prior to this, between local Arab and Jewish militias.

¹⁵ The territory was ruled by Arabs from 637-1099, and thereafter by the Christian Crusader Kingdoms (1099-1291), Turkish Mameluks (1291-1516), Ottoman Turks (1516-1917), and Britain, first directly and then under the Mandate (1917-1948).

¹⁶ See, for example, H. Cattán, "Sovereignty Over Palestine" in Moore, *supra* note 13 at 193-194.

¹⁷ "The Seminar of Arab Jurists" in Moore, *ibid.* at 255.

¹⁸ *Ibid.*

¹⁹ Cattán, in Moore, *supra* note 13 at 193-194.

²⁰ *Ibid.* at 254-255.

²¹ One Arab writer has claimed that the Jordan river referred to in the Bible is actually a rocky ridge located in Southern Arabia. Consequently, that place, and not Palestine, is the Jewish homeland. For a more reasoned Arab view regarding the beginning of concentrated Arab settlement in Palestine, see F. J. Khouri, *The Arab-Israeli Dilemma*, 3rd ed. (Syracuse: University Press, 1985).

²² See Martin, *Le Conflit Israëlo-Arabe: recherches sur l'emploi de la force en droit international public positif*, (Paris: R. Pichon et R. Durand-Auzias, 1973). Martin points out that the Arab proportion of the population would have been somewhat lower had the British not illegally restricted Jewish immigration into Palestine, while ignoring illegal Arab immigration.

territory settled by them for 1,300 years, they had, and have, the right to determine their own future.

SELF-DETERMINATION I: THE MANDATE AND PARTITION

It is undisputed today that the doctrine of self-determination is one of the cardinal principles of international law. First introduced at the Paris Peace Conference by American President Woodrow Wilson in 1919, and subsequently enshrined in the Charter of the United Nations as one of the guiding principles of the organization, its content nevertheless remains conceptually elusive. This question is one of the most pressing facing international law today; it would be presumptuous of this paper to purport to answer it.

Within the context of the struggle over Israel/Palestine, however, the definitive determination of the content of self-determination *today* is somewhat akin to putting the proverbial cart before the horse. Chronology is vitally important: self-determination, and all other legal doctrines, can only be usefully applied one historical stage at a time. The legality, or illegality, of any action taken must be judged on the basis of the law, and of historical facts, as they applied at that time, and not as they have evolved today.

Self-determination and the Palestine Mandate

The Palestine Mandate was granted to Britain by the League as part of the redistribution of the subject territories of the defunct Ottoman Empire. The terms of the Mandate specify that it was to be run for the benefit of the "Jewish People," an entity recognized at international law under the terms of the Paris Peace Conference and of the Mandate itself. Although Jews constituted only about 15% of the population at that time, the effect of the Mandate was to consider *all* Jews as entitled, or "virtual," citizens. The Mandate was to be run for their benefit, and not for the benefit of its Arab majority.²³ Article 2 of the Mandate terms incorporated the Balfour Declaration, and, by virtue of article 4, Britain was required to seek the advice of the Jewish Agency in the administration of Palestine; by article 6, it was to facilitate Jewish immigration; and by article 22, Hebrew, as well as English and Arabic, were to be the official

²³ The reason for this was "the fact that the people whose connection with Palestine has been recognized is still outside its boundaries. The Mandatory Power thus appears not only as a mandatory,...but as a kind of provisional administrator in the interest of an absent people. In this capacity the Mandatory has assumed an obligation not toward the actual but the virtual population of Palestine." Stoyanovsky, *supra* note 10 at 42. This was confirmed by the United Nations Special Committee on Palestine (UNSCOP) in 1947. Feinberg, *supra* note 7 at 26.

languages.²⁴

Although recognized as a principle at the Paris Peace Conference, self-determination was not yet a part of international law. It was rather "a purely political factor," not binding in nature,²⁵ confirmed in 1920 by an *ad hoc* committee of the League of Nations in the *Aaland Islands Case*.²⁶ The Mandates established in the Middle East out of former Turkish provinces constituted an explicit decision by the world community to divide these lands among the Arabs, who were to achieve self-determination in the Syrian, Lebanese, Iraqi, and Transjordanian Mandates, and the Jews, who were to exercise self-determination in Palestine.²⁷ The Arab inhabitants of Palestine were to be guaranteed their civil and religious rights, but not *political* rights to sovereignty.²⁸

The League was very much aware of the implications of its decision to award Palestine to the Jews. In a 1937 report, the Permanent Mandates Commission acknowledged that the creation of a Jewish State in Palestine entailed a sacrifice by the Arabs. The Commission felt, however, that this sacrifice was smaller than the alternative of continued statelessness of the Jews, "since vast spaces in the Near East, formerly the abode of a numerous population and the home of a brilliant civilization, are open to the [Arabs]."²⁹ To compensate partially for this loss, the League agreed to the creation of the Arab state of Transjordan out of the Eastern part of the Palestine Mandate in 1922,³⁰ although the terms of the Mandate otherwise forbade the separation of any part of the territory.³¹

Setting aside the rest of Palestine for the Jews was not opposed by the Arab leadership of the day. The Emir Feisal, representative of the Arabs at the Paris Peace Conference, demanded the promised independent Arab State. He

²⁴ These remain the official languages of the State of Israel.

²⁵ Prof. Charles Dupuis, Paris 1931. Cited by Feinberg, *supra* note 7 at 45.

²⁶ (1920), L.N.O.J., Special Supp. (No. 3) 3.

²⁷ Martin, *supra* note 22 at 10.

²⁸ Use of the term "sovereignty" is perhaps premature: in the case of Palestine, the Jews were to achieve "national home" status, perhaps under British or League protection. However, given the explicit goal of class A Mandates, such as Palestine and the Arab territories – the achievement of full sovereignty by the local populations – it is not illogical to read sovereignty into the concept of the "national home."

²⁹ Cited in Feinberg, *supra* note 7 at 52.

³⁰ Transjordan and Iraq were created by the British in order to reward Sharif Hussein, for his help in the war against Turkey. The League was forced to agree, as Britain would not agree to administer Palestine if the area east of the Jordan river were left within the Mandate. See generally, A. Gerson, *Israel, the West Bank and International Law*, (London: Frank Cass & Co., 1978) at 44.

³¹ However, note art. 25, included at Britain's insistence.

excluded, however, all land west of a line from Alexandretta–Diarbekir (present day Iskanderun) southward – including both Lebanon and Palestine – from his proposed state, “for the mutual consideration of all parties interested.”³² Earlier, Feisal had signed an agreement with Chaim Weizmann and written to Felix Frankfurter, both representatives of the Zionist Organization (the official body representing the Jews at the Conference), to express his support of the Zionist movement.³³ The parties considered the liberated Turkish areas to constitute one geographic area of some 1,184,000 square miles, of which one portion, 11,000 square miles, was to be reserved for a Jewish State.³⁴ The “purely political factor” of self-determination seemed to have been allowed for both Arabs and Jews.

Self-determination at the time of the U.N. Partition Resolution

The situation in 1947 contrasts radically to that of 1919. Self-determination had been enshrined as one of the foremost principles of international law in the United Nations Charter.³⁵ Arab opposition to turning Palestine over to the Jews had manifested itself both in legal protests before the League and in a series of violent riots against the British and the Jews in Palestine in 1929 and 1936. At the same time, the effective extermination of many of Europe’s Jews increased Jewish demands, and international support for, the establishment of the State of Israel. Britain and the United Nations attempted to solve the problem by partitioning Palestine into separate Arab and Jewish States, with Jerusalem as an international zone under U.N. control. Reluctantly supported by the Jewish Agency, *de jure* government-in-waiting of the Jewish state, the Partition Resolution was rejected by the Arabs as a violation of their right to self-determination.

Several questions arise regarding the Partition Resolution. First, was it in fact legal? Second, was it binding in nature or merely recommendatory? Third, what was the legal effect of its rejection by the Arabs?

Was the Partition Resolution Legal?

This question may itself be divided into two components: whether the Resolution was within the competence of the General Assembly, and whether it

³² Official Protocols of the Paris Peace Conference, 1919, cited in Feinberg, *supra* note 7 at 37.

³³ *Ibid.* at 37-38.

³⁴ M. Gilbert, *The Arab–Israeli Conflict: Its History in Maps*, (London: Weidenfeld & Nicolson, 1984) at 7.

³⁵ Article 1, para. 2, and article 55.

violated the principle of self-determination. The question of competency has been answered in the affirmative by most writers, and, indirectly, by the International Court of Justice.³⁶ In discussing General Assembly Resolution 2145 (XXI) terminating the South African Mandate over Namibia (also a Mandated territory inherited by the United Nations as successor to the League),³⁷ the Court rejected South Africa's argument that the General Assembly and/or the United Nations did not have the authority to make such a resolution:

[To] deny to a political organ of the United Nations which is a successor to the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking....It would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.³⁸

Although the principle of self-determination was included in the U.N. Charter, its content had not yet been defined. The barest consensus at that time was that self determination applied only in the context of colonial territories.³⁹ Palestine, however, was not a colonial territory under British sovereignty, but a League of Nations Mandate held in trust for the benefit of the Jews; its sovereignty remained with the League and later the United Nations.⁴⁰ The League of Nations had already decided that self-determination in Palestine was the prerogative of the Jews, not the Palestinian Arabs. Viewed in this light, the Partition Resolution was not a violation so much of the Arabs' rights to self-

³⁶ The Court has relied upon the Partition Resolution in the various *Namibia Cases*.

³⁷ Although some, including Hans Kelsen, have denied that the United Nations succeeded the League, the International Court unanimously held that it had, in the *International Status of South-West Africa Case*, [1950] I.C.J. Rep. 128.

³⁸ *Namibia Case*, [1971] I.C.J. Rep. 16 at 49.

³⁹ See generally, Brilmayer, "Secession and Self-Determination: A Territorial Interpretation" (1991) 16 Yale J. Int'l L. 177.

⁴⁰ Henry Cattán has denied that sovereignty resided with the League, calling this theory "abandoned and discredited," but he does not say by whom. However, in the absence at the time of any right to self-determination, sovereignty could not be said to have resided with "the people." If this were so, how could the Mandates system be justifiable, even within the context of the times? Even Cattán is forced to rely on the *South-West Africa Case*, *supra* which states that the Mandatory is to administer the Mandated Territory "on behalf of the League, with the object of promoting the well-being and development of the inhabitants" (Emphasis added.) Clearly sovereignty in this situation resides with that body.

determination, such as they were at the time, but a violation of the Jews' rights to self-determination, as awarded to them by the League and relied upon in immigrating to Palestine and organizing themselves into a political society.

Whether the Resolution was in fact a violation of the Jews' rights at international law, a breach of a merely moral commitment, or within international law, depends on the view one has of the actual goal of the Palestine Mandate: simply a "national home," possibly under Arab sovereignty, which is unlikely; a Jewish State "in Palestine," *i.e.*, in *part* of Palestine; or in (all of) Mandate Palestine, from which Transjordan had already been severed to serve as a Palestinian Arab State. There is insufficient authority for any determinative evaluation on this point.⁴¹ The question is of merely academic interest, however, as the Jewish Agency's acceptance of the Partition Resolution vitiates any possible claim of illegality by the Jews.⁴²

The Partition Resolution Binding: The effect of its rejection by the Arabs

Although the International Court has confirmed the right of the General Assembly to alter the status of a mandated territory,⁴³ it remains unclear if such alterations are binding by themselves, or whether they require the approval of the Security Council to make them so. Writers are divided on this subject, with no clear division by either bias or sympathy. Most seem to support the view, however, that the Partition Resolution was recommendatory only, which would become binding on the parties only upon their acceptance of it, or a Security Council Resolution demanding its application.⁴⁴ This is supported by the fact that the General Assembly requested the Security Council to take steps toward its implementation, and to determine any threats to the peace. On the other hand, it also directed the Security Council to consider any act against its implementation to be a breach of the peace.

In any event, the Arabs rejected the Resolution. The Security Council did

⁴¹ Although the fact that the Mandatory power was to consult with the Jewish Agency on the governance of *all* Palestine (after the severance of Transjordan) might indicate that the original plan had been to award the rest of the territory to the Jews.

⁴² Regarding partitions in general, *i.e.*, in territories without the extraneous facts of Palestine, it is interesting to note that the General Assembly voted in 1962 to partition Rwanda from the Mandate of Burundi to allow for two claims to self-determination. Four Arab States (who deny the right of the General Assembly to partition Palestine) were among the sponsors of the Resolution, and all ten present voted in favour. See Martin, *supra* note 22 at 51.

⁴³ *South-West Africa Case*, *supra* note 37.

⁴⁴ Martin, Feinberg, Elihu Lauterpacht, and Rostow consider the Resolution to be a recommendation only. Gerson argued it was mandatory, as does Cassese, with some qualifications.

not act until 15 July, two months after the end of the Mandate, Israel's Declaration of Independence, and the outbreak of full-scale war. By that time the Partition Resolution had been overtaken by events. Even the United Nations no longer relied upon it.⁴⁵ The better view would therefore seem to be that the Partition Resolution never was, and is certainly no longer, good law.

Of course, the Resolution did play a legal role. Most obviously, it authorized Israel to declare legally its independence with the support of the *opinio juris* of the world community. By the same token, even though the Arabs were entitled to reject the General Assembly's recommendation, their attack on the new state the day after its promulgation constituted an act of defiance toward the will of the international community. They were free to oppose partition and to refuse to recognize Israel. They were not free to attack it, since it had been legally established. The United Nations agreed; Secretary-General Trygve Lie considered the Arab invasion to be the first example of aggression since the end of the Second World War.⁴⁶

LEGAL TITLE TO THE TERRITORIES

With an understanding of the territory of Mandated Palestine as a whole, the paper now turns to an individual consideration of the territory taken by Israel in 1948-49, and the lands acquired as a result of the 1967 war: the "West Bank," the Gaza Strip, the Golan, and East Jerusalem.

The Acquisition of Territory by Force

As part of the prohibition of the use of force in international relations, the acquisition of territory by force has been outlawed by the United Nations Charter.⁴⁷ The Arab-Israeli dispute, however, defies established views of the law. It provides what is to date perhaps the only example since 1946 of territory acquired by conquest in a *defensive* war. This consideration has led some writers to propose a theory of conquest which would distinguish between territory acquired offensively through an "illegal" war and that which is acquired

⁴⁵ As demonstrated by its acceptance of the cease-fire lines as boundaries after 1949, despite Israeli gains.

⁴⁶ See Feinberg, *supra* note 7 at 113. Sorensen went further, denying any state the right to refuse to recognize the legality of a state "created" by the will of the United Nations.

⁴⁷ U.N. Charter, art. 2; it is possible that the prohibition pre-dates the Charter at customary law: see Bishop, *International Law, Cases and Materials*, (Boston: Little, Brown, 1971) at 418-422.

defensively, in the legal exercise of self-defence.⁴⁸ Proponents of this view⁴⁹ argue that the principle of the non-use of force is itself derived from a more basic principle – *ex injuria jus non oritur*. To guarantee the territorial integrity of an aggressor state, they claim, is to provide a form of insurance to states wishing to attack their neighbours by removing the most powerful of deterrents to aggression.

Although not followed by a majority of writers, this view holds significant support. Authority may be found for it in the state practice of the last 50 years. The international community recognized as legal the post World War II border alterations of Poland, the Soviet Union, and Germany made under the principle of defensive war. In 1970, Chancellor Brandt of West Germany explicitly recognized this price of aggression when that country formally recognized the Oder–Neisse frontier.⁵⁰ It was confirmed by Chancellor Kohl in 1990. Another example is afforded by the 1948–49 and 1967 Arab–Israeli wars, discussed below.

More recent state practice is less clear. The United Nations and Allied Powers of the Gulf War of 1991 clearly felt that Iraq's boundaries should not be changed, despite the fact that that country had invaded Kuwait and threatened Saudi Arabia and Israel. At the same time, however, they participated, or acquiesced, in the temporary occupation of northern Iraq for the benefit of the Kurds, demonstrating at least some willingness to interfere in the internal affairs of an aggressor state. There is no consensus on this subject at international law. As stated by Martin, however, "*il est difficile de prétendre, juridiquement, que toute occupation de territoire à la suite d'une victoire militaire soit contraire à la Charte*".⁵¹ This lack of consensus, moreover, may not be fatal to the application of the principle to the conflict over Palestine, as discussed below.

Territory captured in 1948–49

During Israel's war of independence, Israel captured territory not allocated to it under the Partition Resolution. The 1949 Cease-Fire Agreements that it had

⁴⁸ Georg Schwarzenberger first made this distinction between "legal" and "illegal" wars in *A Manual of International Law*, (London: Stevens & Sons, 1960) at 183.

⁴⁹ These include, among writers cited in this paper, Martin, Schwebel, Rostow, Stone, and Dinstein. As cited above, Schwarzenberger also made the distinction, without referring directly to the Arab–Israeli conflict. Stephen M. Schwebel, now at the International Court of Justice, was the first to comprehensively relate this to the 1967 war in an influential comment, "What Weight to Conquest" (1970) 64 A.J.I.L. 344.

⁵⁰ Martin, *supra* note 22 at 281.

⁵¹ *Ibid.* at 235. ("It is difficult to make the claim, legally, that all occupations of territory following a military victory are a violation of the *Charter*")

signed with each Arab State left the territory in Israeli hands, and it was incorporated into the new state. This action was largely uncontested by the world community, principally because the Partition boundaries represented an unimplemented intention rather than legal boundaries.⁵² For this reason, United Nations cease-fire resolutions relating to Palestine did not call for a return to the pre-war Partition boundaries, as they did in Korea in 1950, and in Kashmir in 1971.⁵³ The *status quo* was recognized by the United States, Britain, and France in the 1950 Tripartite Declaration,⁵⁴ and the Security Council declared the Armistice Agreements (leaving the additional territory in Israel's hands) to be permanent agreements on 1 September, 1951.⁵⁵ Thus it is clear that the Security Council was prepared to acquiesce in the conquest of territory when it is acquired defensively.

The question of territories captured in a defensive war was again considered by the Security Council after the 1967 war, discussed below. The legality of Israel's annexation of lands captured in 1948–49 was confirmed by its total omission from Resolution 242,⁵⁶ calling on Israeli withdrawal from at least some of the lands captured in 1967, despite repeated Arab efforts to affirm the illegality of acquiring *any* territory by force. The issue of lands captured by Israel in 1948–49 has therefore largely been resolved in Israel's favour; although there are still some who dispute this, they are generally those who deny the legality of Israel's very existence.⁵⁷ Even most Arab states today speak of Israeli withdrawal to its pre-1967 boundaries when they hint at recognition, not to its Partition ones.

Territories captured by Israel in 1967

The discussion of the territories captured by Israel in 1967 hinges on one assumption: the pre-emptive attack by Israel on 5 June 1967 was, under customary international law and article 51 of the U.N. Charter, a legitimate use of self-defence.

The 1967 Six-Day War was preceded by a period of acute tension. Following several months of increased Syrian shelling of northern Israel, and Israeli retaliation, Egypt expelled the United Nations Emergency Force from the

⁵² E. Lauterpacht, "Jerusalem and the Holy Places" in Moore, *supra* note 13 at 945.

⁵³ See Martin, *supra* note 22 at 240–241.

⁵⁴ Pappé, *Britain and the Arab-Israeli Conflict, 1948–51*, (New York: St. Martin's Press) at 200.

⁵⁵ S.C. Resolution 95 (1951).

⁵⁶ See appendix.

⁵⁷ For example, H. Cattán, *Le Monde Diplomatique*, (Jan. 1992).

Sinai desert.⁵⁸ It then closed the Straits of Aqaba to Israeli shipping, violating an international guarantee to Israel made in 1957.⁵⁹ Between 25 May and 5 June, the Egyptian, Jordanian, and Syrian armies, reinforced by contingents from Iraq and Saudi Arabia, took up positions at Israel's borders, accompanied by threats of war and extermination and what Fred Khouri has euphemistically labelled "unduly intemperate" language.⁶⁰

Arab writers have denied that there was any intention to attack Israel; it is a denial that holds little water. By their own admission at the time, the Arab strategy was either to strangle Israel economically by requiring it to maintain the full mobilization of a citizen army, or to provoke it into striking the first blow, so as to label it the aggressor.⁶¹ That their plan succeeded should not be cause for complaint.

On the morning of 5 June, the Israeli airforce destroyed the airforces of Egypt, Syria and Jordan whilst they were still on the ground; thereafter the war was won in all but name. In six days the Israelis won control of the remainder of Mandate Palestine (the West Bank, East Jerusalem and Gaza), the Golan, and the Sinai – an area nearly three times the size of the state.

The question of pre-emptive attacks, like that of territory acquired defensively, has not definitively been laid to rest. Supporters are generally one and the same.⁶² Fortunately, because the United Nations passed Resolution 242 regarding the 1967 war, it is unnecessary to determine the answer generally in order to deal with this particular situation. Despite strenuous attempts by the Arabs and by the Soviet Union, the Security Council refused to label Israel the aggressor in the Six-Day war, and only the U.S.S.R., Bulgaria, India and Mali voted to condemn Israel.⁶³ A similar attempt in the General Assembly failed 36–57–23.⁶⁴ The United Nations thus recognized the legitimacy of Israel's pre-emptive attack, and in effect recognized that it acted in legitimate self-defence.⁶⁵

⁵⁸ The forces had been there since the 1956 Suez Crisis. Although Secretary-General U Thant was criticized severely for the rapidity with which he complied with the Egyptian demand, the demand itself was legal; Israel had earlier refused the UNEF permission to position itself within Israeli territory.

⁵⁹ S. D. Bailey, *The Making of Resolution 242*, (Dordrecht: Martinus Nijhoff, 1985) at 7.

⁶⁰ See Khouri, *supra* note 21 at 250, and Bailey, *ibid.* at 64.

⁶¹ Cairo Radio, 30 May 1967. Also, Bailey, *ibid.* at 64.

⁶² Supporters argue that by using the phrase "inherent right of self-defence", article 51 incorporates the traditional doctrine of self-defence, including a right in certain circumstances to pre-emptive attack. Detractors view any attempt to legitimate the use of force as a dangerous opening for abuse.

⁶³ Bailey, *supra* note 59 at 104. British Prime Minister Wilson, for his part, considered the Soviet Union at least partially responsible for the war; *ibid.* at 106.

⁶⁴ E. Lauterpacht, in Moore, *supra* note 13 at 935.

⁶⁵ This fulfills the requirement of *ex post facto* recognition of self-defence suggested by

The West Bank

The West Bank did not exist as a separate entity until 1949. Known in ancient times and under the Mandate as Judea (the area of the West Bank south of Jerusalem) and Samaria (north of Jerusalem), it is an area without natural borders of any kind. Rather, it is the extent to which the Transjordanian Arab Legion, under British command, was able to occupy and to defend as part of Mandate Palestine during the 1948 war. In October of that year, it was annexed by Transjordan after a "referendum" of Palestinian leaders (mostly village mukhtars, or headmen) marred by accusations of intimidation and fraud.⁶⁶ The Arab League bitterly denounced the annexation, and nearly expelled Jordan (so named after the annexation) for its action.⁶⁷ It was not recognized by any state except Britain and Pakistan.

The territory was captured by Israel in June 1967. In September of that year, Israel proposed returning 70% of the territory to Jordan (keeping the Jordan valley and the old city of Jerusalem and widening its territory somewhat along the coastal plain), in exchange for a peace treaty. The plan also envisaged free access to a Mediterranean port for Jordan, along with a common market, and free access to Jerusalem. The plan was rejected by Jordan.⁶⁸ Despite this, with the exception of East Jerusalem and the surrounding area, it has not been annexed, although there are many in Israel who have called for it.⁶⁹ Israel applies principally Jordanian law to the territory, and schools are still run according to the current Jordanian curriculum.⁷⁰ The Israeli proposal of September 1967 remains the official policy of the current Labour Party government. There are thus three distinct claims to the West Bank: those of Jordan, Israel, and the Palestinians.

Jordan

Jordan's claim stems from its 1950 *Act of Union* and 19 years of peaceful

L. Oppenheim/ H. Lauterpacht, *International Law: A Treatise*, (London: Longmans', 1963) at 187.

⁶⁶ A. Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank" (1973) 14 Harv.Int'l.L.J. 1 at 37.

⁶⁷ J. L. Ray, *The Future of American-Israeli Relations: A Parting of the Ways?*, (Lexington: University of Kentucky Press, 1985), 71.

⁶⁸ *The New York Times* (28 September 1967), A1.

⁶⁹ The Likud party, which is ideologically and politically committed to retention of the territory, with an eye to annexation. That it has not yet done so may be due to intense international pressure, and to an unwillingness to absorb 1 million Arab citizens into the state (Israel's constitution extends citizenship to those Arabs within its borders).

⁷⁰ Israel censors this material, however, deleting references to the destruction of Israel for security reasons.

occupation from 1948–1967. Jordan's claim however, is the weakest of the three for two reasons: its annexation was never recognized by the international community, and, more important, it renounced formally its claim in favour of the Palestinians in July 1988.⁷¹ This renunciation remains questionable, however. Under the terms of Jordan's constitution of 1952, the union of Transjordan and the West Bank is declared indivisible, so that by Jordanian law the renunciation of 1988 is void. Only the Jordanian National Assembly may cede territory, but this body was dissolved by King Hussein and not replaced before his act of cession. Under Jordanian, if not international law, Jordan's claim still exists.⁷²

Israel

Israel's claim is based upon historical connection, the League of Nations mandate, self-defence, and national security. Historically, the West Bank constitutes the ancient homeland of the Jews to a far greater extent than does the coastal strip, which in ancient times was often occupied by foreign powers. The mountainous interior was more easily defensible; it is here that the two national capitals, Jerusalem and Samaria, were located, and where the national revolt against the Greeks leading to a century of restored sovereignty began in 165 B.C.⁷³ As indicated above, the relevance of this historical connection was explicitly affirmed by the League and the United Nations.

Israel argues further that it acquired the territory in a defensive war against an illegal occupant. In fact, as between Jordan and Israel, Jordan admits to having fired first in 1967, despite warnings from Israel to stay out of the war.⁷⁴ Therefore, in conquering the West Bank, Israel claims to have restored the unity of the territory allocated to the Jews by the League of Nations. Further, because the Partition Resolution was most likely recommendatory in nature, and rejected by the Arabs (including Jordan), Israel's position is that the Resolution is void. As a result, pending eventual Israeli annexation, the Mandate constitutes the last legitimate legal regime in the area. Israel thus considers the West Bank to be "unallocated territory," a remainder of the Mandate, in which the legal rights of the Mandate, including Jewish immigration and settlement, remain in force.⁷⁵

⁷¹ C. Foster, "A Promised Land" (1991) 141 New L.J. 702 at 703.

⁷² *Ibid.* at 704.

⁷³ Malvina Halberstam, "Self-Determination in the Arab-Israeli Conflict: Meaning, Myth and Politics" in "1988 Symposium" *supra* note 3 at 472.

⁷⁴ Gerson, *supra* note 66 at 8.

⁷⁵ It is somewhat misleading to write that Israel makes this claim. More accurately, it is the Likud Party, which does so, supported by some jurists and writers, such as Eugene Rostow. See "Palestinian Self-Determination: Possible Futures for the Unallocated

Although the tidiness of this argument is appealing, it does contain one serious flaw. It ignores the world community in general, and the United Nations in particular. Both the Security Council and especially the General Assembly have recognized the Palestinian Arabs as a distinct entity; the General Assembly has declared every year that they are entitled to "inalienable rights" to self-determination.⁷⁶ Even discounting the excesses of the General Assembly, it is clear that the Palestinians are considered an entity at international law.⁷⁷

Supporters of Israel's claim reply that they do not deny the Palestinian right to self-determination, but rather that the right is properly exercised in Jordan, a state carved out of the Palestine Mandate for this very reason, and whose population is already composed of between 60% and 70% Palestinians.⁷⁸ However accurate this argument may be, it does not take into account the Security Council's often repeated opinion that the West Bank does not belong to Israel.⁷⁹ Although Resolution 242 does not settle the eventual ownership of the West Bank, it quite clearly does not allow for Israeli annexation without a formal cession as a part of a general settlement.

Israel's last claim is based upon its security, and in this respect, it stands on firmer ground. The West Bank bulges out into Israeli territory, which is twelve kilometres wide in places. Its border is notoriously complicated, as befits a cease-fire line. It contains most of the strategic high ground in Palestine, from which one commands the entire coastal plain containing the bulk of Israel's population. Prior to 1967, the West Bank was used as a launching-board for attacks on Israeli territory and civilians, contrary to international law. Indeed, Israel's security concerns were acknowledged by the United Nations in Resolution 242, discussed below.

As between Jordan and Israel, it would seem that Israel has the better claim, especially if Jordan's renunciation is taken at face value. Using the formulation of the *Island of Palmas Case*,⁸⁰ no state has "better title" to the West Bank than

Territories of the Palestine Mandate" (1979) 5 Yale Stud. World Pub. Ord. 147.

⁷⁶ For example, G.A. Res. 2787, 6 Dec. 1970; G.A. Res. 3236, (22 Nov. 1974). The General Assembly Resolutions are at best nearly meaningless political statements, supported by Muslim, Communist, and Third World States. At worst they are themselves illegal; they contain no reference to the territory of "Palestine", suggesting that the Palestinians are entitled to all of it. They also explicitly allow for the use of force against the territory of a member State, Israel; together these two facts imply support for the destruction of Israel and its replacement by a Palestinian State.

⁷⁷ See arguments below.

⁷⁸ Y. Blum, "Self-Determination: the Case of Palestine" (1988) 82 Proc. Am. Soc. Int'l. L. 341. The figure is not disputed, only its significance.

⁷⁹ For example, in Resolutions 242 and 338 (confirming 242), resolutions accepted by Israel. It is therefore not necessary to consider less widely-accepted resolutions.

⁸⁰ *Netherlands v. United States*, (1928), 2 R.I.A.A. 829.

Israel. The real question is therefore the contest between Israel and the Palestinians, which is discussed separately below.

Gaza

Legally, the Gaza district is in the same position as the West Bank. It also was a part of the Mandate. It also did not exist before 1949. In this case it constitutes the bit of Palestine illegally held by the Egyptian army at the time of the final ceasefire of that year. Egypt's refusal to vacate the territory was contrary to the terms of its ceasefire agreement with Israel.⁸¹

Like the West Bank, the Gaza Strip was used as a staging area for attacks on Israeli territory. Indeed it is in Gaza where the first *Fedayeen*, or guerillas (the forerunner of the P.L.O.), were recruited by Egypt for this purpose. And like the West Bank, Gaza was also conquered by Israel in 1967. The sole legal difference may be that Egypt never annexed the area, ruling it through a puppet, the "All-Palestine Government." Actually, Gaza was an occupied territory ruled by military order, but legally it became the only part of Palestine which was reserved for the Palestinians. Under both Egyptian and Israeli rule, Gaza has been governed by Mandate law. There are, therefore, only two claims to Gaza, that of Israel and that of the Palestinians. They are identical to those made with respect to the West Bank, except that in the case of Israel, there is less of a historical connection, as the area forms part of the coastal plain.

The Golan Heights

The Golan is a plateau rising 500 meters above sea level, but to nearly 900 meters above the valley floor below, part of the Great Rift sitting at more than 350 meters below sea level. Of the territories occupied by Israel in 1967, the Golan is an anomaly in that it has been formally annexed. Israeli jurisdiction and law was proclaimed in 1981, but no state has recognized this act.

The Golan's status prior to 1967 was not in dispute; it was not part of the Palestine Mandate but an integral part of Syria.⁸² Israel's claim to the Golan is

⁸¹ W. M. Brinton, "Israel: What is Occupied Territory? A Reply to the Legal Advisor" (1979) 2 Harv. J.L. and Pub.Pol'y. 209.

⁸² As with so many other questions in the Middle East, even this fact is not entirely without problems. The Golan was, in fact, included in the territory of the Palestine Mandate in 1920, but was ceded to the French Mandate of Syria on 7 March 1923 in order to unify the lands of a wealthy Arab landowner. This act may have been illegal, as the Mandate terms forbade the transfer of territory to any other power. Technically, however, the Mandate, which was confirmed by the League on 24 July 1922, did not take effect until 29 September, 1923. The legality of the transfer depends on the power of Britain to make unilateral changes after the Mandate grant but before the promulgation

therefore purely one of national security. Before 1967, the Syrians used it to shell Israeli settlements in the valley below. Although clearly a violation of international law, whether or not a state should lose title to territory used in this manner depends on the unanswered question of territory conquered in a defensive war.

Jerusalem

This territory, the smallest in area of all those concerned, looms as likely the most difficult to settle. The city was to be internationalized under the Partition Resolution, but the 1948–49 war left it divided between Israel, controlling the new, western side, and Jordan in the older, eastern half. Each side was annexed soon after by the two states, and West Jerusalem declared the capital of Israel. Few states recognized these annexations *de jure*, but most acquiesced and did so *de facto*, maintaining consulates on both sides, and presenting ambassadors to Israel in its half.⁸³

In many respects East Jerusalem's legal status is the same as that of the West Bank, of which it forms a part. It is different in its history, because the city was meant to be internationalized, and it has been annexed by Israel. Like the Golan, this annexation has not been recognized by the international community.

History

The significant difference between Jerusalem and the rest of the West Bank is that the city has had a Jewish majority since the mid-19th century, which indicates its centrality to the Jews. The city is important and holy to Muslims as well, although it does not play as central a role since Mecca and Medina are the pivotal cities of the Muslim world.⁸⁴ It is to Jerusalem which Jews turn when praying. Although not of significance in international law, once again this fact may be relevant given the League of Nation's recognition of the special connection between Palestine and the Jews.

In the 1949 Israel–Jordan Armistice Agreement, each side recognized the other's *de facto* control over the city and guaranteed access to the holy sites to all. The agreement was violated by Jordan, however, which destroyed the Jewish Quarter of the old city, vandalized Jewish cemeteries, and forbade access

date. To my knowledge, nobody has answered this. It would seem that at the very least, the transfer of the Golan was a violation of the spirit of the Mandate, if not the letter.

⁸³ Khouri, *supra*, note 21 at 110.

⁸⁴ The often repeated claim that Jerusalem is the third-holiest Muslim city is somewhat tenuous. In 1844, Jerusalem was a semi-deserted town of 12,000, 7,000 of whom were Jews. Stone, "No Peace No War in the Middle East" in Moore, *supra* note 13 at 141–157.

to the old city (where most of the holy sites are located) to Jews.⁸⁵

For its part, the United Nations "showed no concern" over Jordanian violations,⁸⁶ and seems to have acquiesced in the partition of Jerusalem. Although it continued to call for internationalization until 1952, thereafter the U.N. ignored the question altogether. It is unclear whether this constituted acquiescence or merely recognition of its own impotence. The fact that the United Nations did not renew calls for internationalization after 1967, calling instead for a negotiated solution between Israel and Jordan, perhaps indicates the former.⁸⁷ The Arab states, with the exception of Jordan, continued to call for an international regime for Jerusalem. Even Arab writers acknowledge that this demand was more to weaken Israel (and snub Jordan) than to show any special concern over the city and its inhabitants.⁸⁸

After Israel's capture of the eastern part of Jerusalem in 1967, the city was declared "united" and confirmed as the capital of Israel. This status was contested by most states. In 1967, and again in 1980, the General Assembly and the Security Council strongly condemned Israel's annexation of East Jerusalem, declaring all Israeli judicial acts there to be null and void. The condemnations, however, did not refer to the original plan of internationalization. Resolution 242, which applies to all the territories acquired by Israel in 1967, calls instead for a negotiated solution on the basis of trading land for peace, without specifically mentioning the status of Jerusalem.

The city is today claimed by both Israel and the Palestinians as their respective capitals. Interestingly, while the P.L.O. seems to favour dividing the city, Palestinians living there seem to favour a unified jurisdiction.⁸⁹ One suggestion put forward as a possible solution entails the "functional internationalization" of the city. Under this scheme, first proposed by the Netherlands and Sweden in 1949 (and supported by Canada at that time), only the holy sites, and not the entire city, would be internationalized. The proposal failed to attract sufficient support, due mainly to the division of the city; Jordan, in particular, refused because it considered the holy sites to be already adequately protected.⁹⁰

⁸⁵ Khouri, *supra* note 21 at 112; Feinberg, *supra* note 7 at 111.

⁸⁶ E. Lauterpacht, in Moore, *supra* note 13 at 934.

⁸⁷ This is not a unanimous conclusion. Some writers believe that internationalization may remain in force as U.N. policy. See A. Cassese, "Legal Considerations on the International Status of Jerusalem" (1986) 3 Palestine Y.B. Int'l.L. 13. Cassese does recognize tacit acceptance of Israeli control over west Jerusalem.

⁸⁸ Khouri, *supra* note 21 at 106-107.

⁸⁹ C. Albin, "Negotiating Indivisible Goods: The Case of Jerusalem" (1991) 13 Jer. J.Int'l.Rel. 45 at 51.

⁹⁰ E. Lauterpacht, in Moore, *supra* note 13 at 947-955.

RESOLUTION 242⁹¹

Resolution 242, passed unanimously by the Security Council on 22 November 1967, remains the favoured formula of most states for a territorial settlement. The crux of the Resolution is the return of "territories" captured by Israel in 1967 in exchange for "secure and recognized boundaries" detailed in peace treaties with the Arab states. The principle has been accepted by Israel, most Arab states, and recently somewhat obliquely by the P.L.O.⁹²

A solution is not near, however, as there are varying interpretations of the Resolution; each party "accepts" the interpretation it favours. There are two principal interpretations. The first, favoured by Israel and most Western states, is that withdrawal is to take place after negotiations have determined what constitute "secure and recognized boundaries" and after a peace treaty has been signed. The second, favoured by the Arabs and until recently by the Communist states, is that Israeli withdrawal from *all* territory captured is to precede any negotiations and any peace treaty. The varying interpretations of 242 are the result of deliberate obfuscation by the Security Council, which used vague language in order to obtain unanimous support. Indeed, Lord Caradon, British ambassador to the U.N. at the time, confirmed that it was only the text itself which was accepted by the Security Council, and, that in the matter of interpretation, "each delegate rightly speaks only for itself."⁹³

The intended interpretation of Resolution 242 is, however, quite readily discernable, using standard techniques of legal interpretation. Study of both the draft proposals circulated at the Security Council and the debates which took place, shows that every attempt by Communist or Muslim states to impose an Israeli withdrawal prior to any negotiations (or indeed *without* any negotiations) failed to receive support.⁹⁴ This view has also been supported by state practice and also underlies the convening of the Middle East Peace talks which began in November 1991. Few non-Muslim states have called on Israel to withdraw unilaterally from its conquests.

A greater controversy regards the extent to which Resolution 242 calls upon Israel to withdraw from the disputed territories. Specifically, questions remain over whether the Resolution applies to *all* of the territory, and whether it applies

⁹¹ See Appendix.

⁹² The P.L.O. accepted Resolution 242 and "other Resolutions" pertaining to the Middle East, some of which contradict Resolution 242. See J. L. Prince, "The International Legal Implications of the November 1988 Palestinian Declaration of Statehood" (1989) 25 *Stan. J.Int'l.L.* 681 at 687.

⁹³ P. Weil, "Territorial Settlement in the Resolution of November 22, 1967" in Moore, *supra* note 13, at 319-326.

⁹⁴ Bailey, *supra* note 59, ch. 12.

to all the *territories*: the West Bank, Gaza, the Golan, and East Jerusalem, and not one or the other, or portions thereof. For example, some Israelis argue that by withdrawing from the Sinai, 90% of the total area captured in 1967, in exchange for peace with Egypt, Israel has already complied with Resolution 242. Again, examination of the *travaux préparatoires* of Resolution 242 provides a strong indication that Resolution 242 applies to all of the territories, but not to all of the territory.

Territory

The problem regarding the extent of an Israeli withdrawal arises from the restatement of the principle of non-acquisition of territory by force, together with the omission of the definitive article "the" before the word "territory" in the Resolution. It is compounded by the fact that the French version of the Resolution, which is equally authoritative, *does* contain the definitive article, mandating an Israeli withdrawal "*des territoires occupés lors du récent conflit*". The latter consideration may not be problematic however. In such a construction, the French language does not permit the omission of the definitive article. It would therefore have been quite impossible to translate Resolution 242 accurately into French.⁹⁵

Further, study of the Resolution's history shows that the omission was deliberate. The Arab states made "strong efforts" to include the word "the" into the Resolution, but were unsuccessful.⁹⁶ All attempts to specify the extent of an Israeli withdrawal failed likewise. Indeed, in the House of Commons, the British Foreign Secretary confirmed that Resolution 242 did not mandate Israeli withdrawal from all the territory captured in 1967 despite its confirmation of the general principle of non-acquisition of territory by force. Even the semi-official Egyptian newspaper *El Ahram* admitted this fact.⁹⁷

Territories

Israel sometimes claims to have complied with the text of Resolution 242 by withdrawing from the Sinai under the terms of its Peace Treaty with Egypt. From a straight textual analysis this claim would seem justified, particularly as it is only the text which is authoritative. Examinations of the debates preceding Resolution 242, however, and of the interpretations of the states on the Security Council in 1967 show that withdrawal was envisaged on all fronts. It was

⁹⁵ The Resolution was drafted by Britain, in English.

⁹⁶ Bailey, *supra* note 59 at 153.

⁹⁷ *House of Commons Debates* (17 November 1969). Both examples are cited by Weil, *supra* note 93 at 321.

certainly the interpretation of Lord Caradon, who was, after all, one of its principal drafters.⁹⁸ It is also the view of most states today.

“Secure and Recognized Boundaries”

Israel's claim to have met the terms of Resolution 242 is related to the use of the phrase “Secure and Recognized Boundaries” in Resolution 242. Essentially, Israel claims that secure boundaries entail the retention of all, most, or some (depending on which Israelis) of the territory captured in 1967. This claim generally means keeping both the Golan Heights and all or portions of the West Bank, both of which entail varying degrees of risk to Israel if in Arab hands. The Security Council apparently supports this Israeli view, as indicated by its sanction of the annexation or retention by Israel of at least some of the land it occupied in 1967. Use of the word “recognized” is problematic because it adds the requirement that the Arabs cede this land to Israel, or, at the very least, that the international community accepts whatever changes are made, which is unlikely without Arab approval. But the extent to which security requires territory, and to which the Arabs will accept *any* border changes, remains one of the greatest stumbling blocks to any agreement.⁹⁹

Effect of Resolution 242

Resolution 242 presents a coherent, if vague, blueprint for peace.¹⁰⁰ While it leaves determination of the ownership of the territories to negotiation, some facts may be inferred as certain. First, there is no obligation that Israel must return to the Partition Boundaries of Resolution 181, the stated preferred option of the Arabs. Second, there is no requirement that Israel withdraw from *any* of the territories until it is assured of a comprehensive settlement with the Arabs, or at least with one Arab State at a time. Third, this settlement must entail recognition of Israel by the Arabs, not merely an interim arrangement. Fourth, the Arabs may need to accept the cession of some land to Israel, although changes will need to be made through negotiation and cannot be made unilaterally. This last aspect will be the most difficult; even Israel's least

⁹⁸ Bailey, *supra* note 59 at 154.

⁹⁹ Note however, that all of the Armistice Agreements signed by Israel and the Arab States in 1949 stated, upon Arab insistence, that the boundaries were ceasefire lines and not permanent borders. The fact that they envisaged Israel's disappearance, and not its expansion, should not permit them to claim now that the 1949 boundaries are sacrosanct.

¹⁰⁰ Resolution 242 was not mandatory. No reference is made to ch. VII of the U.N. Charter, and several speakers during the debates attempted unsuccessfully to convince the others to make it so. Its wide acceptance by the international community however, may entail a requirement that it be followed.

demanding plan, under which it would retain control over 30% of the West Bank, goes far beyond what any Arab state has deemed acceptable.

SELF-DETERMINATION II: WHO CONSTITUTES A "PEOPLE"?

The definition of a "people", another of international law's most vexing problems, is of vital importance since self-determination applies only to groups constituting a people. A "people" has been defined as a "distinct ethnic group with common historical links and cultural traditions" which shares a sense of community.¹⁰¹ Although most definitions are similar, none has officially been established at international law.

Although both Palestinians and Israelis support the applicability of the principle of self-determination in international law, each has sometimes denied its applicability to the other by denying that the other constitutes a "people." The question of whether Jews and Palestinians meet the requirements of a collectivity subject to international law is therefore vital to an understanding of the relationship between Jews, Arabs, and the international community. As one writer has commented:

[A]n emergent nationalism cannot be treated as if it had developed decades before for the purposes of facilely ignoring entitlements previously fixed and acted upon...to ignore chronology would result in an arbitrary reconstruction of both events and rights of peoples, as they presented themselves after World War One to claim a share in the distribution of the territory of the defeated Turkish empire.¹⁰²

Are Jews a "people"?

Jews have almost always seen themselves, and have been seen by others, as a separate people, distinct from the population of the country in which they live. This was especially true historically, before they were emancipated (in Europe and North America), and, at least legally, recognized as full citizens of their states.

Although challenged by the Arabs,¹⁰³ international law before 1948 had

¹⁰¹ Dinstein, in "1988 Symposium" *supra* note 3 at 454.

¹⁰² Stone, in Moore, *supra* note 13 at 583.

¹⁰³ Arab writers have declared Judaism to be a religion and nothing more; others have claimed that modern Jews are descendants of the Khazars, a Slavic tribe which converted to Judaism in the eighth century and which ruled over much of what is today the Ukraine and the area around the Caspian Sea until the end of the tenth century. The effect of this is to deny that modern Jews have any historical connection with Palestine. See Israeli, *supra* note 10 at 59-87.

clearly recognized a "Jewish people" as a subject of international law. As discussed above, the Paris Peace Conference explicitly did so, and the League of Nations went further, naming the Zionist Organization its representative, with the Jewish Agency as government-in-waiting of Palestine.¹⁰⁴ After the Second World War, the United Nations Special Committee on Palestine confirmed this view, as did the International War Crimes Tribunal at Nuremberg.¹⁰⁵ Feinberg believes that this special status terminated with the establishment of Israel in 1948.¹⁰⁶ Whether or not he is correct is irrelevant for the present purposes, as Israel has become subject to international law as a state in the Middle East.

Do the Palestinians Constitute a "People"?

The "Palestinian as a people" question is more usefully divided into two: first, can the Palestinians be said to have constituted a people in 1948; and second, do they constitute a people today.

Did the Palestinians Constitute a "People" in 1948?

The Arab claim that the creation of Israel violated the Palestinians' right to self-determination (such as the right existed at that time), presupposes that the Arabs then living in Palestine constituted a "people." It is clear that the international community did not see them as such in 1919, or indeed in 1947, but rather considered them to be a part of the larger Arab nation.¹⁰⁷ This accorded with the geographic, historical, and cultural facts of the area. Until the British conquest of the area, Palestine did not even exist as a separate entity. What the British later called Western Palestine was divided between the administrative units of the Vilayet of Beirut and the Mutasarriflik of Jerusalem. The area as a whole, including what are known today as Israel, the West Bank and Gaza, Jordan, Syria and Lebanon, was known as "Southern Syria." What we refer to as "Palestine" had not existed as a distinct unit since its loss by the Byzantine Empire in 637,¹⁰⁸ and had not known independence since the fall of the

¹⁰⁴ See Feinberg, in Moore, *supra* note 13 at 59-87.

¹⁰⁵ The Tribunal considered German atrocities to have been committed against, amongst others, the "Jewish people" and not against individual Jews. See Feinberg, *supra* note 7 at 24-25.

¹⁰⁶ *Ibid.* at 26.

¹⁰⁷ This leads to the thought that the Palestinian Arabs could achieve self-determination within the framework of Eastern Palestine, or Transjordan, or even within any other future Arab State. In 1919, a single Arab state stretching from Iraq to Eastern Palestine, including Syria and Arabia, was envisaged.

¹⁰⁸ Blum, *supra* note 78 at 339. For that matter, most Arab states of today did not exist as distinct units until European colonialism and the Mandates system made them so, a fact which contributed to the Pan-Arabism prevalent until recently throughout the Middle

Hasmonean Jewish Kingdom in 63 B.C.

The Palestinian Arabs did not develop a national consciousness until the mid-1960's; they felt "an attachment to the entire Arab East rather than...to a Palestine State."¹⁰⁹ In 1970, Crown Prince Hassan of Jordan told the West that "Palestine is Jordan and Jordan is Palestine. There is one people and one land, with one history and one destiny."¹¹⁰ As late as 1977, the head of the Palestine Liberation Organization Military Operations Department told a Dutch newspaper that there was "no difference between Jordanians, Palestinians, Syrians, and Lebanese...we are one people. Only for political reasons do we carefully underline our Palestinian identity."¹¹¹

The question of Palestinian peoplehood is illustrated by the Arab immigration into Palestine during the British Mandate. By all accounts, the region which became Palestine was barren and underpopulated under Turkish rule. The population in 1883 was estimated at 470,000 by the Turkish census; by 1919, it had grown by only 30,000, an increase of just over 6%.¹¹² Yet from 1919 to 1939, the Arab population increased by approximately 75%, to nearly 900,000, during which time the population of Egypt increased by only 25%.¹¹³ In 1937, the British Peel Commission Report reported what it considered "substantial" uncontrolled immigration of Arabs from other territories into Palestine.¹¹⁴ At least one author has claimed that a substantial portion of the people now claiming Palestinian nationality are descended from immigrants into Palestine during this period.¹¹⁵

East.

¹⁰⁹ M. Hudson, "The Palestinian Arab Resistance Movement: Its significance in the Middle East" in Moore, *supra* note 13 at 492-493. Also S. N. Anabtawi, "The Palestinian as a Political Entity" in Moore, *ibid.* at 506-517.

¹¹⁰ Cited by Halberstam in "1988 Symposium" *supra* note 3 at 485.

¹¹¹ Cited in Stone, *supra* note 3 at 11.

¹¹² Turkish census of 1883, cited in Gilbert, *supra* note 34, map 3; also review of Joan Peters' *From Time Immemorial*, Daniel Pipes, *Commentary*, (July 1984).

¹¹³ Halberstam, in "1988 Symposium" *supra* note 3 at 475. The rate of increase was far higher in areas of dense Jewish settlement, approaching 400%, due to increased economic activity. See J Peters, *From Time Immemorial*, (New York: Harper & Row, 1984). Ironically, Ms. Peters was a civil rights activist who began her work sympathizing with the Palestinian struggle; her research led her to believe that a distinct Palestinian identity had been deliberately invented in order to delegitimize Israel.

¹¹⁴ Stone, in Moore, *supra* note 13 at 590. At the same time, British authorities were controlling Jewish immigration into Palestine. In 1939, the Permanent Mandates Commission of the League of Nations concluded that such restrictions, particularly the White Paper of 1939 which was to eventually halt all immigration (thus ensuring an Arab State in Palestine), were illegal under the terms of the Mandate.

¹¹⁵ Peters, *supra* note 113. Some of the book's figures have been questioned. This does not detract, however, from its main premise that the Palestinian claim to be the

These population figures, while not determinative of any rights at international law, have two important effects. First, they suggest that many Palestinians today may be descended from Arabs whose roots in Palestine reach back no further than many Israelis', and, in fact, were drawn to Palestine by the jobs generated by Jewish immigration. Second, they suggest that there is little to distinguish Palestinians from other Arabs, which is the essential feature of a "people."

If the Palestinians did not constitute a "people" in 1919 or 1948, then the decisions of the League of Nations and the United Nations to award Palestine to the Jews can not be said to have been in any way a violation of the principle of self-determination, *regardless of the content one attributes to it at those times*. The League was therefore more correct than the United Nations, even by the standards of today, in characterizing the concurrent claims by Arabs and Jews to the Middle East as claims between two and not several peoples. According to the League, the territory was large enough to easily accommodate them both: the Jews in (Western) Palestine, the Arabs in the rest of the Middle East.¹¹⁶

By this token, Britain's obligation under the Mandate to ensure that the "civil and religious" rights of the Arab inhabitants of Palestine were not prejudiced, constituted an obligation toward *individuals*, not toward a collectivity that did not exist. The notion that "civil rights" included political rights, such as self-determination (if such could be said to have existed) is also irreconcilable with the explicit goal of the Mandate, a Jewish national home. This dual obligation theory of the Palestine Mandate has been accepted by some.¹¹⁷ In light of the fact that there was no "Palestine" before its creation as a future national home for the Jews, that the Palestinian Arabs themselves had little or no national cohesion, that the Arab leadership accepted the creation of the Mandate, and, that they considered themselves to be one people entitled to one state and not many peoples entitled to many states, there seems to be little basis to argue that Palestinians constituted a people in 1948.

indigenous people of Palestine may be less true than might be imagined.

¹¹⁶ Stone, in Moore, *supra* note 13 at 583-585. I am not suggesting that the General Assembly acted illegally in voting to partition Palestine, but that they acted out of a desire to avoid a war, not out of a view that the Palestinian Arabs constituted a people. This interpretation is supported by Security Council Resolution 242 (1967), which considers the Palestinians to be a refugee problem, not one of self-determination.

¹¹⁷ For example, see Allan Gerson. This may also have been the dominant view at the United Nations, since it voted to partition Palestine. This may also have been seen, however, as the only practical manner in which to avoid a war.

Do the Palestinians constitute a people today?

In discovering the status of the Palestinians today, it is crucial to determine whether a group of people can acquire nationality where none existed before. There is little literature on this, but it is possible to construct an argument using generally established principles of international law, as well as historical examples.

Traditionally, at international law, the status of a "people" has been accorded only to groups that have historically constituted a collectivity. Although there are signs of growing support for extension of this principle, it is far from clear how far this does, or will, extend.¹¹⁸ One increasingly popular view argues for the recognition of "peoplehood" rights whenever an identifiable group is subjected to gross abuse of human rights, as was recognized in the *Universal Declaration of Human Rights* and other U.N. documents.¹¹⁹ This view, however, cannot yet be said to form an accepted part of international law.¹²⁰ It would appear that a collectivity must be a historically-recognized group to qualify for self-determination.

In a recent study of self-determination claims, moreover, one scholar has argued that the term is itself a misleading characterization of what are more often territorial disputes. Noting that disputed territories are, by definition, claimed on the basis of some connection with more than one "people", she examines several situations where territory was claimed successfully by one state *against* the wishes of its inhabitants, such as Goa and the Mayotte Islands, and others where the claim was ultimately unsuccessful but supported by a number of states, such as the Falkland Islands claim by Argentina, and Spain's claim to Gibraltar.¹²¹ To these cases can be added Indonesia's annexation of East Timor.¹²² Of course, the world is full of historically-recognized groups denied self-determination by their states.

¹¹⁸ Flack *et al.* "The International Legal Right of Self-Determination: Four Legal Approaches and their Textual Foundations" (1990) 1 Dal.J.Leg.Stud. 189.

¹¹⁹ *Universal Declaration on Human Rights*, U.N.G.A. Res. 217 (III), 3 U.N. GAOR Supp. (No. 13) 71, U.N. Doc. A/810 (1948).

¹²⁰ Consider, for example, the Kurdish uprising in Iraq in 1991. The oppression of the Kurds by that state merited the intervention of the allied states, but none went so far as to suggest the creation of a separate Kurdish nation. This may represent the high point of the "human rights" approach to peoplehood and self-determination thus far. It is also doubtful whether this humanitarian intervention would have occurred had Iraq not lost a war against these same allies only weeks before.

¹²¹ Brilmayer, *supra*, note 39 at 193-194.

¹²² Ms. Brilmayer may have omitted these places because they do not contain "historically distinct" groups, even though the East Timorese are Catholic. Her inclusion of Goa, however, would be inconsistent by that standard.

Despite these reservations, self-determination remains a principle of international law, although its application may be imperfect and it is often used as a political weapon, rather than a legal right. The immediate question here must therefore be whether a people can evolve out of a group of individuals into a cohesive community. There is no reason to presuppose that it could not; all nations must have a beginning in this way. In 1921, the Arabs were considered, and considered themselves to be one people. In 1991, the United Nations authorized a war to liberate one Arab state from another which had wrongfully invaded it – a recognition of changed status, of the creation, during the past seventy years, of separate Arab nationalities. If the Palestinians did not constitute a people in 1919 or 1948, this does not mean that they can never become one.

Paradoxically, they may have become an internationally-recognized people in a manner similar to Jews: by being rejected as citizens by most states. It is important to note that, in the Middle East, Jordan and Israel have offered citizenship to those Palestinians living on their territory. The Palestinians have very consciously established a national identity, in much the same way the Jews did in Palestine from the 1880s onward. This identity has been established by carefully constructing a social structure with its own government-in-exile, schools, hospitals, and so on. There can be no doubt that they have been recognized as an entity internationally, and are probably recognized as a people as well. The Palestinians are represented at the United Nations; they maintain offices in most industrialized states, some of which are treated as embassies;¹²³ and they have been recognized by the European Community as a people deserving of self-determination in the Venice Declaration of June 1980.¹²⁴ In addition, since 1970 they have been recognized by the General Assembly as a people with a right to self-determination, although this has been undeniably political and may even be illegal.¹²⁵

Critics claim that this recognition has been a political process, engineered by the Arabs and Communist states, aimed at undermining Israel. In support of this claim they point out that no Arab state called for a Palestinian state in the

¹²³ France, Spain, Greece, Italy, and China, among others, provide diplomatic or quasi-diplomatic status to P.L.O. offices in their capitals.

¹²⁴ The Declaration, which carries no weight legally in and of itself, laid out the EC position on the Middle East: the right to exist and the security of all states in the region, including Israel; the Palestinian right to self-determination; P.L.O. association with any negotiations to this end; non-acceptance of unilateral changes to the status of Jerusalem; a halt to Israeli settlement activities in the West Bank, Gaza and the Golan; and an end to the Israeli occupation of these territories. It is unclear whether this last point is to be achieved without recognition of Israel by the Arabs or not.

¹²⁵ See *supra* note 76.

West Bank prior to Israel's conquests of 1967. They further argue that the Arab states have done little to aid materially their Palestinian "brethren" and much to harm them, including killing or expelling them,¹²⁶ often purposely in order to use the Palestinians as a tool against Israel.¹²⁷

These criticisms, even if justified historically, are legally problematic in that they assume that the recognition of "peoplehood" or a right to self-determination must be just if it is to be considered legal. International law, however, has not yet advanced to the point where politics does not play a large role in its formulation and application. Thus, recognition of the Palestinians as a people at this stage may be unhistorical, even "unfair" to Israel, but it is no more so than the refusal to recognize an independent Kurdistan or Biafra, or for that matter than a refusal to recognize the Palestinians would be, given the refusal of most Arab countries to grant them citizenship. The international community has recognized the Palestinians as a legal entity, and, as a member of that community, Israel has no choice but to accept this verdict, or violate international law.

SELF-DETERMINATION III: WHAT ARE THE PALESTINIANS ENTITLED TO AT INTERNATIONAL LAW

The fact that the Palestinians have been recognized as constituting a people does not mean that they are entitled automatically to a state. In fact, various resolutions, declarations and pronouncements by the international community have created a mass of contradictory views as to the best solution of the Palestinian problem. If one discounts the posturing of the General Assembly and of the Arab states themselves, it is possible to determine an outline of a solution that has been sanctioned, if vaguely, by international law.

Territorial extent

Whatever form the Palestinian "national home" takes, it is clear that under international law, it is to be located "in" and not "of" the West Bank and Gaza. Neither is the national home in Jordan, nor to replace Israel, nor within the boundaries described in the Partition Plan. This is clear from the text and accepted interpretation of Resolution 242. Whether this will entail major or only

¹²⁶ Examples include the massacre of Palestinians in Jordan in "Black September" 1970, and their expulsion from Kuwait following the 1991 Gulf War.

¹²⁷ They are supported in such claims by reports from aid workers. In 1958, Ralph Galloway, head of the United Nations Relief and Works Agency (UNRWA), stated that "the Arab states do not want to solve the refugee problem. They want to keep it as an open sore, as an affront to the U.N. and as a weapon against Israel. Arab leaders do not give a damn whether the refugees live or die." Cited in Halberstam, *supra* note 3 at 478.

minor territorial changes is left to the political, not legal, process, although the strength of Israel in comparison to that of the Arabs is such that major changes are more likely, barring a significant amount of outside pressure. Likewise, it is unlikely that Israel would permit the redivision of Jerusalem, although it might be persuaded to grant some form of autonomy to the Arab sections of the city.

That this is the only legal solution is also evident from the alternatives. Bluntly, these alternatives are Israeli annexation of the territories and their populations; the same annexation followed by Israeli expulsion of the Palestinian inhabitants; or the destruction of Israel by the Arabs. None of these would be legal under current international law. Some Israelis (about 15%) favour what they call population transfer, arguing that Israel absorbed one half million Jewish refugees from Arab lands after 1948. They also point to the massive population transfers of this century, such as those of Turks and Greeks in 1923, Hindus and Muslims in India and Pakistan in 1947–48, and Germans in Poland in 1946. The fact that these occurred however, does not make them legal under current law, which generally stresses moving borders around people rather than the reverse.

Similarly, advocating Jordan as a Palestinian state, as some Israelis do (it is already so in all but name, with about 70% of its population being Palestinian, the rest Bedouin), would not solve the problem of the status of the West Bank and Gaza. Israel would still be confronted with a choice between expelling the inhabitants or granting them citizenship. Moreover, the divided nature of a Palestinian national home does not provide the problems in law that it would provide in practice. There have been other examples of similarly divided states, such as Germany between the wars, and Pakistan until 1971. Whether this territory would be viable as a state presents a far greater problem for international law.

Nature of the Palestinian National Home

If international law has accorded the right to some form of self-determination to the Palestinians, it has not specified the extent of that right. Although self-determination may indicate, most basically, the right of peoples to choose their own destiny, not all peoples can choose to establish a state. Other legal principles must be considered: the viability of the proposed state, its effect on other states, and the security of its neighbours.¹²⁸ The economic viability of an independent Palestinian state in the West Bank and Gaza has not been seriously argued. If such a state were to allow immigration of Palestinians from

¹²⁸ Halberstam, *supra* note 3 at 471. The basis for this argument is found in the U.N. Charter and other documents, which guarantee the integrity of existing states.

other parts of the Middle East, it would contain a population of several million, in an area the size of which one writer has commented makes urban planning nearly more realistic than the drawing of frontiers.¹²⁹ In addition, Resolution 242's corresponding emphasis on Israel's right to security would have a significant effect on a Palestinian state. What Palestinians themselves have said on this point bears study.

Palestine and Israel's security

So long as the Palestinians and other Arab states continued to call for the destruction of Israel, there was no legal obligation upon Israel to negotiate the future of the West Bank and other territories. For the Palestinians in particular, international legal recognition of their claim to self-determination required the *quid pro quo* of recognition of Israel's right to exist, and a willingness to live in peace with it. For this reason, the Palestine Liberation Organization's declaration at Algiers in November 1988 recognizing Resolution 242¹³⁰ as the basis of any settlement, is significant.

The manner of its acceptance is, however, problematic. The Algiers Declaration recognized Resolution 242, but referred also to all other U.N. pronouncements on the Middle East, some of which are contradictory of 242. Specifically, the P.L.O. referred to Resolution 181, Partition, a dead letter which greatly confuses the issue of the boundaries it hopes Palestine to achieve. Further, the Algiers Declaration did not refer to Israel by name, calling it instead the "colonial, racist, fascist regime" and the "Zionist entity." The fact that until now the P.L.O. has held that Israel was not a state at all but an illegal entity casts at least some question as to whether or not it feels Israel is one of the states whose right to peace and security is guaranteed under Resolution 242.¹³¹ Of course, the Declaration is not the only indication of the P.L.O.'s position, and it has indicated, most notably in Stockholm in 1988, that the Declaration does apply to Israel. The P.L.O.'s tacit participation in the current peace negotiations also indicates recognition of Israel as a state. It is precisely what the Arab states, with the exception of Egypt in 1977, sought to avoid from 1948–1991 in refusing direct negotiations with Israel.

Serious inconsistencies remain, however, in the P.L.O.'s position after Algiers. First, the P.L.O. has not repudiated the National Charter, its Constitution. Article 2 of that document considers that "Palestine with the

¹²⁹ G. Gottlieb, *Remarks* (1989) 83 Proc. Am. Soc. Int'l.L. 125 at 126.

¹³⁰ The P.L.O. recognized the Resolution, but not Israel, as some have claimed, although by implication this is the case.

¹³¹ See generally Prince, *supra* note 92.

boundaries it had during the British Mandate [is] indivisible," while article 15 states that "the liberation of Palestine is a national duty and aims at the elimination of Zionism in Palestine." Of equal consequence are pronouncements made by senior P.L.O. officials since the Algiers Declaration. In Kuwait on 21 December 1988, one month *after* Algiers, the Chairman of the Palestine National Council, the Palestinian government-in-exile, stated publicly that "if the P.L.O.succeeds in establishing a State in the West Bank and in Gaza, it would not prevent the continuation of the struggle until the liberation of all Palestine is achieved. We are working to achieve what is possible in the present phase, and afterwards we will demand more."¹³² Pronouncements such as these do little to convince Israelis that the P.L.O. has truly met the requirements of its international recognition. Until it does, Israeli concerns regarding the creation of a Palestinian state in the West Bank and Gaza will remain legitimate.

LEGAL STATUS OF THE TERRITORIES

If the future status of the territories is open to much debate, it is possible to make some observations on the position of international law. Although they remain technically as unallocated parts of the Palestine Mandate, the West Bank and Gaza seem to be held in trust for the Palestinians, pending a settlement in which Israel may retain those parts that are vital to its security. The Palestinians for whom the territories are being reserved have the obligation to recognize and live in peace with Israel. They do not necessarily have the right to a state, but rather to some form of self-government, which may include statehood. East Jerusalem is to be a subject of negotiations.

The Golan Heights remain part of Syria at international law. Any settlement however, must take into account Israel's security concerns. A return to the *status quo ante* is not required, but the form of a settlement depends on the parties. It can include a demilitarized Golan in Syrian hands, a shared Golan, an Israeli Golan, or any combination thereof. Like the Palestinians, the Syrians are required to recognize Israel and to live peacefully in return for any settlement.

All of these territories are legally held by Israel, which is permitted to keep them until such time as the conclusion of a peace treaty requires it to give them, or parts of them to the Arabs. For its part, Israel is under an obligation to negotiate in good faith with any neighbouring Arab government, including the Palestinians. The last requirement may include the P.L.O. This would depend on the P.L.O.'s true position regarding Resolution 242. Israel is under no obligation to negotiate with an organization devoted to its destruction, but it

¹³² Cited by Halberstam, in "Proceedings of the 83rd Annual Meeting" *supra* note 129.

cannot refuse on principle to negotiate with any relevant group. The international community has legitimized the P.L.O., with one condition. If that condition has been met, Israel is required to negotiate with it.¹³³

The status of the territories seems to have come full circle, returning to a Mandate-style trust – this time in favour of the Palestinians. In a series of well-argued articles, Allan Gerson has claimed that Israel is the legal administrator of territory which it must eventually give up. He called this a position of Trustee-Occupancy.¹³⁴ He bases his view in the fact that, as Jordan's occupation of the West Bank was itself illegal, there is no legitimate sovereign power to whom to "return" the territory.¹³⁵ It is thus Israel's responsibility, as legitimate occupier, to administer and develop the territories on behalf of the people to whom it is eventually awarded. This could include Palestinians or Israelis, with the proviso that Israel could not alter their legal status unilaterally. It has become clear that since the publication of his article, the international community has decided to award the territories to the Palestinians, subject to the conditions and terms discussed in this paper.¹³⁶ It would appear that this was the view of the Israeli government prior to the ascendancy of the Likud Party in 1977. In fact, much development work occurred in the West Bank, including building of roads, hospitals, and schools.¹³⁷ The Likud Party's claim to the territory, however, while not itself illegal, had led to an abandonment of trustee-style activities in the West Bank, replacing them with annexation-style endeavours. The activities may be the same; it is their rationale, their pace, and their location that is

¹³³ Under its terms of reference the P.L.O. is excluded from the current talks. It seems nevertheless to be playing a significant background role, which Israel seems to have acquiesced in.

¹³⁴ Professor Gerson established his theory in an article entitled "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank." He subsequently expanded it into a book, *Israel, the West Bank, and International Law*. Both are cited in this paper, *supra* notes 30 and 66.

¹³⁵ Golda Meir, then Prime Minister of Israel, asked rhetorically, "To whom shall I return the West Bank? Am I to wrap it in a pink ribbon and send it to some Arab post office marked 'to whom it may concern'?" Cited in Ray, *supra* note 67 at 81.

¹³⁶ I have not dealt with the issue of Israeli settlements in these territories. However, under Gerson's thesis, these would be legal so long as they were established in order to develop the area or for Israel's security. They would be illegal where they are established for permanent settlement, other than for those reasons. Settlements established for the development of the area would become subject to whichever jurisdiction acquired the territory after its final determination. It would be circular and illegal to argue for the retention of the territories on the basis of the settlements themselves.

¹³⁷ For example, there are now several universities on the West Bank where, under Jordanian rule, there was one junior college. The economic benefits of Israeli rule were also apparent in the decade following 1967; the standard of living in the West Bank is substantially higher than in Jordan. See Ray, *supra* note 67 at 68-69

different. Although subtle, it may be sufficient to cross into an illegal, slow annexation. Professor Gerson's arguments for a new international legal status have not been widely supported, at least explicitly. This may be because he does little to satisfy people on both sides who advocate more, either the destruction of Israel, the immediate creation of a Palestinian State on all of the West Bank and Gaza, or the annexation of the West Bank. It is the belief of this writer, however, that time has vindicated Professor Gerson. International law, specifically through Resolution 242 and state practice, has essentially accepted his position that Israel is the legal possessor of the disputed territories, in anticipation of a final political settlement which will entail relinquishing control of most of the territories, in exchange for true peace and security.

CONCLUSION

Any conclusion adding to what has already been said would leave the realm of law and enter that of political speculation. Still, if the speculation is grounded in legal considerations, it must have a place in the conclusion of a paper of this nature.

As indicated above, it is of some concern that the West Bank and Gaza are not sufficiently large to accommodate the demands of the Palestinians for a state of their own. In practical terms this means that even if one accepts the P.L.O.'s Algiers Declaration at face value, that the Palestinian state or region would not threaten Israel's security, some form of confederation with either Jordan or Israel would be required, for the sake of its own survival. Historically, geographically, and economically, the best solution for Palestine might seem to be a loose confederation with Israel. Given the mistrust and even hatred between Palestinians and Israelis, however, it is hard to conceive of this as a realistic possibility. It is far more likely that a Palestinian state on the West Bank would turn to Jordan as a partner. Because of the predominantly Palestinian nature of Jordan, this could entail a full Palestinian state comprised of Jordan plus part or most of the West Bank, with Gaza as an adjunct territory. Such a state would need to give security guarantees to Israel, probably including a demilitarized West Bank and Gaza. Israel would likely require the retention of territory along the Jordan river, and some extra width along its coastal plain.

The question of East Jerusalem would seem to be more difficult. Its legal status is yet to be determined. Realistically, especially given the manner in which access was denied to Jews under Jordanian rule, there is little likelihood of Israel ever giving it up. Indeed, the city has already been surrounded by Jewish suburbs intended to ensure this premise. Nevertheless, there is no reason that some sort of special legal regime could not be formulated to satisfy at least

some of its Palestinian inhabitants' aspirations. Israel's primary concern in Jerusalem is to secure access to the holy places, and to maintain security in its capital city. This does not necessarily preclude some arrangement regarding Muslim holy places, and even Arab neighbourhoods of East Jerusalem outside of the Old City. These could be declared autonomous, or even sovereign enclaves of Jordan-Palestine. Such enclaves have existed before, for example in the International Zone in Shanghai until 1939. Indeed, Spain still maintains enclaves in France (in the Pyrenees), and in Morocco. In fact, since 1967, Israel has adhered, in a more limited way, to this sort of policy. Access to the Muslim and Christian holy sites are guaranteed, and is controlled by their respective communities. The extension of this principle to one of sovereign enclaves is one which may bear some consideration.

The future of the Golan must similarly be determined by negotiations with Syria. Although the legal status of these territories might appear more clear than that of the West Bank and Gaza, in practical terms the level of hostility between Syria and Israel is such that this will probably require a long period of negotiation. Even then it is unclear that any settlement is likely between them.

In a more general manner, the relevance of international law to the Palestine problem has been challenged. Indeed, the political nature of much of the law, at least in regard to the Middle East, argues for caution. Yet each side continues to ground its arguments to some degree in international law, albeit in wildly differing interpretations of that law. The acceptance that there is a role for legal considerations, however reluctant, largely justifies the tremendous volume of work done in this area. If it is unlikely, as one writer claimed, "that anyone will listen to the lawyers,"¹³⁸ it is highly likely that the law will play some role in establishing the guidelines and parameters of acceptable outcomes. In many ways, as demonstrated in this paper, it already has.

¹³⁸ Foster, *supra* note 71 at 702.

APPENDIX

Security Council Resolution 242 Concerning Principles for a Just and Lasting Peace in the Middle East, November 22, 1967*

The Security Council

Expressing its continuing concern with the grave situation in the Middle East,
Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;**,

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

Adopted unanimously at the
 1382nd meeting.

* S.C. Res. 242, 22 U.N. SCOR, 1382d meeting, at 8-9 (1967).

** The French version of section 1(i) of this Resolution provides: "Retrait des forces armées israéliennes des territoires occupés lors du récent conflit." The English and French versions are equally authoritative.